(3)

No. 06-1142

FILED
APR 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ROBERT L. AYERS, JR., WARDEN,

Petitioner,

v.

JACKSON CHAMBERS DANIELS, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN T. PHILIPSBORN
Counsel of Record
LAW OFFICES
507 Polk Street, Suite 350
San Francisco, CA 94102
tel: (415) 771-3801
fax: (415) 771-3218

JOHN G. COTSIRILOS
LAW OFFICES
2442 Fourth Avenue
San Diego, CA 92101
tel: (619) 232-6022
fax: (619) 232-6052
Counsel for Respondent Jackson C. Daniels, Jr.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

COUNTER-STATEMENT OF THE QUESTION PRESENTED

After evidence is taken and facts are found by a Federal reviewing court on the nature and extent of a conflict of interest between the accused and his lawyer, and a finding is made that there was an "irreconcilable conflict" that deprived the accused of his Sixth Amendment right to counsel through the trial, is it necessary for the reviewing court also to assess prejudice under the *Strickland v. Washington*, 466 U.S. 674 (1984) test?

RESPONDENT'S FORMULATION OF THE QUESTIONS PRESENTED

1. When a criminal defendant refuses to cooperate with his counsel due to his subjective mistrust of them, (a) is he constructively denied his right to counsel? or (b) is counsel ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to overcome that impediment?

2. May defense counsel be found to have provided ineffective representation under *Strickland v. Washington*, based on the failure to investigate and present evidence regarding a defendant's mental health when trial counsel rely on the opinions of two mental health experts that the defendant does not suffer from mental illness?

3. When a state trial court denies a criminal defendant's change of venue motion, may a court of review presume prejudice based solely on pre-trial publicity and without regard to jurors' statements of impartiality during voir dire?

RESPONDENT'S FORMULATION OF THE QUESTIONS PRESENTED – Continued

4. After *Brown v. Sanders*, 546 U.S. 212 (2006), can it be constitutional error for a California court to fail to instruct a capital sentencing jury, *sua sponte*, not to double count redundant multiple-murder "special circumstance" factors where the jury could consider the same underlying evidence as aggravating?

TABLE OF CONTENTS

	Page
OPINIONS AND JUDGMENTS BELOW	1
STATEMENT OF JURISDICTION	1
INTRODUCTION	1
STATEMENT	5
REASONS FOR DENYING THE WRIT	9
Introduction	9
A. The Ninth Circuit Correctly Applied the Law on the Implications of an Irreconcilable Conflict Amounting to a Deprivation of Counsel to this Case, and its Addition of a Prejudice-Intensive Analysis Was Clearly Intended to Demonstrate That its Ruling Was Factually and Legally Correct	14
B. The Ninth Circuit and District Court Correctly Concluded That There Was Prejudicial Ineffective Assistance of Counsel	21
C. The Ninth Circuit's Discussion of the Additional Prejudice Caused By Errors in Decisions on Change of Venue and Redundant Special Circumstance Issues Were Part of the Consideration of Cumulative Error, and Clearly Not the Basis for the Ninth Circuit's Essential Ruling	25
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Morris v. Slappy, 461 U.S. 1 (1983) 7, 20

Perry v. Leeke, 488 U.S. 272 (1989) 6

Rompilla v. Beard, 545 U.S. 374 (2005) 11, 22

Strickland v. Washington, 466 U.S. 668 (1984) 6

U.S. v. Cronic, 466 U.S. 648 (1984) 6, 21

Wiggins v. Smith, 539 U.S. 510 (2003) 12, 22

CONSTITUTIONAL PROVISIONS

Fifth Amendment 3

Sixth Amendment 3, 7, 20, 21

STATUTES

28 U.S.C. §1254(1) 1

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 428 F.3d 1181. The order denying rehearing *en banc* was not reported. The order and judgment of the United States District Court for the Southern District of California granting relief with respect to death sentence and denying relief with respect to guilt phase claims is unreported. Petitioner has appended both the opinion of the Court of Appeals and the order of the District Court in his Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 2005. The order denying Petitioner Ayers' petition for rehearing *en banc* was filed on November 17, 2006.[1] The jurisdiction of the Court has been invoked under 28 U.S.C. §1254(1).

INTRODUCTION

After an evidentiary hearing during which it heard from his Lead Trial Counsel, and reviewed numerous exhibits, including files, records, and correspondence from Respondent Daniels concerning his lack of trust in trial counsel, that had never previously been reviewed in an

[1] The petition erroneously indicates that the District Court denied the petition for writ, and that it was Respondent Daniels who filed a petition for rehearing *en banc*. As noted here, the District Court granted part of the petition, and it was Petitioner Ayers who sought rehearing *en banc*.

evidentiary hearing in the State courts (none was ever held), the District Court found persuasive evidence of a breakdown in communication between Respondent and his trial counsel. Comparing the facts of Respondent's case to those reported in other Ninth Circuit decisions, the District Court concluded that no other reported Ninth Circuit case had involved a more clear showing that the breakdown in the attorney-client relationship amounted to a constructive denial of the right to counsel than the one in *this* case. (Petitioner's Appendix C at p. 77a, order on petition for writ.)

The District Court examined the effect of the breakdown in communication under the standards pertinent to conflicts of interest between counsel and a criminal defendant, and under those applicable to a claim of ineffective assistance of counsel. Noting that prejudice did not likely need to be determined under the circumstances, nonetheless the District Court engaged in meticulous fact-finding concerning the prejudice to Respondent from the breakdown in his relationship with his lawyers. It also reviewed the facts demonstrating trial counsels' ineffective investigation and preparation of their defense and noted the short period of time they had to prepare Respondent's capital case for trial. It granted relief. That relief, at the District Court level, was limited to reversal of the penalty, on the basis that the infection of the case by the irreconcilable conflict, and counsel's ineffectiveness, affected the penalty phase more than the guilt trial. Both parties appealed the District Court's decision, and Petitioner raised the same contentions in the Ninth Circuit as he had before the District Court, and as he does now.

On appeal, the Ninth Circuit reviewed in detail the District Court finding that the irreconcilable conflict had

manifested itself prior to the commencement of the guilt phase, and had been brought to the attention of the trial court at that time (Petitioner's Appendix B at p. 10a). Finding not only proof of the conflict, and that Respondent's trial lawyers were ineffective in both guilt and penalty preparation and conducted inadequate investigation, it also noted that counsel had only four months (approximately) to prepare their case for trial while litigating motions, and were handicapped by prior counsels' failure to have undertaken any significant guilt and penalty phase preparation. The Ninth Circuit concluded that " . . . [Respondent] proceeded to trial with defense counsel he did not trust and who lacked the time and experience to adequately try a capital murder case." (Petitioner's Appendix B, Ninth Circuit opinion at p. 12a.)

Petitioner attempts to couch the questions presented here as involving misapplication of precedent, and misunderstanding of the law. But the Ninth Circuit's ruling in this case was required by the convincing evidence that there were both Fifth and Sixth Amendment violations as demonstrated below.

Both the District Court and the Ninth Circuit concluded that in addition to the irreconcilable breakdown in the attorney-client relationship, the evidence presented on *habeas corpus* demonstrated that there was ample and obvious evidence uncollected by defense counsel that supported not only a guilt phase defense, but also supplied a compelling theme in mitigation.

Had defense counsel investigated their case, and been able to communicate with their client, they would have uncovered evidence that Respondent, who had a family history of mental illness, had developed an understandable

fear that he would die in custody in the aftermath of being rendered a paraplegic in 1980. There was evidence that he had become despondent and suicidal shortly after having been wounded by police gunfire and severely debilitated in 1980. His mental health, which had previously been questioned, had also deteriorated after 1980. Defense counsel had not prepared a family history, and had not acquired public, medical and legal records relevant to Respondent's case. After having achieved some level of recovery from his grave injuries and entertaining the hope that he might walk again, Respondent was erroneously arrested prior to the advent of the capital case. He was literally dragged on the floor of the Riverside County Jail instead of wheeled around in his wheelchair, and developed a serious infection as a result of the lack of adequate medical treatment. A civil action for damages was brought against Riverside County. Respondent wrote a compelling history of that event, which was relayed to his lawyer at the time, Andrew Roth. But the trial lawyers in the capital case, unable to overcome the breakdown in their relationship with Respondent, never acquired records of the erroneous arrest, and did not make use of attorney Roth (who also represented Respondent during the course of the capital case until he was removed by court order) as a source of information, even though he was known to have a useful relationship of trust with Respondent. The records evidencing Respondent's mental health issues up to his traumatic injury in 1980 and his deterioration after 1980 could have served as the cornerstone of the defense's approach to the case. This was part of what caused the lower courts to grant relief, besides the critical finding that there had been an irreconcilable conflict between Respondent and his trial lawyers.

Finally, Respondent urges the Court to find that Petitioner's questions do not adequately identify the issues decided by the Ninth Circuit and, though Respondent argues that there is no basis for granting *certiorari* here, that the Court should adopt the question presented by the Respondent.

STATEMENT

1. On May 23, 2002 the District Court, Central District of California, granted then Respondent Jackson Chambers Daniels, Jr. *habeas* relief on the issue of penalty, while denying him relief with respect to guilt phase claims. (Petitioner's Appendix C beginning at 56(a).) Prior to that ruling, the District Court held an evidentiary hearing during which it heard from (among others) Petitioner's Lead Counsel at trial, Carl Jordan, and Dr. John Stahlberg, a psychiatrist that the District Court had appointed as its own expert to review the medical and mental health evidence. The District Court also reviewed hundreds of pages of documents submitted by the parties as part of the evidence, including previously unexamined portions of trial counsel's files, medical reports, documents bearing on Respondent's background and history, a thorough psychiatric examination of Respondent, and a number of witness statements. It also reviewed letters written by Respondent to Riverside, California, attorney Andrew Roth after the appointment of trial counsel evidencing Respondent's mistrust of his trial counsel, and his belief that his trial lawyers were discussing what he said with the prosecution. This mistrust was confirmed by the defense's investigator and Respondent's girlfriend at the time. Respondent was described as being convinced that

his trial counsel were cooperating with the prosecution to see him convicted and sentenced to death.

2(a). As a result of its lengthy review process the District Court concluded that there was an "irreconcilable conflict" between Respondent and trial counsel. This conflict had been brought to the attention of the trial court. That court made cursory inquiry and took no curative steps. Respondent was sentenced to death in the California trial court. The state courts granted no *habeas corpus* hearings. The District Court concluded that Respondent had in effect been denied counsel, though it applied to the issue the *Strickland v. Washington*, 466 U.S. 668 (1984) prejudice standard and conducted a prejudice review of the facts. It did so notwithstanding rulings from this Court that denial of counsel is a structural error that does not require a prejudice-intensive inquiry. *Perry v. Leeke*, 488 U.S. 272, 278-279 (1989); *U.S. v. Cronic*, 466 U.S. 648, 659, n.25 (1984).

(b) Based on its review of the facts, the District Court concluded that:

> No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel is violated by reason of a breakdown of communications between client and counsel has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself [footnote omitted]. [Petitioner's Appendix C, District Court opinion at p. 77a.]

3. The Ninth Circuit Court of Appeal reviewed the record, and reiterated many of the District Court's factual findings. Based on the facts demonstrating a lack of communication, and serious conflict, the Ninth Circuit

applied a presumption of prejudice, but nonetheless, undertook a detailed review of the prejudice resulting from the conflict. (Petitioner's Appendix B at p. 27a-47a.) It found that the irreconcilable conflict infected all of the trial proceedings, and that there were Sixth Amendment violations both at the guilt and penalty phase trials.

4. During proceedings below, Petitioner repeatedly attempted to characterize the legal basis for relief as involving a misapplication and misunderstanding of *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983). He does so again here. (Petition at pp. 9-10.) He also seeks to describe this case as one that involves an indigent defendant's unwillingness to communicate with his trial counsel in the aftermath of a trial court's failure to reappoint his 'favorite lawyer' at public expense. (Petition at p. 13.) However, the facts found by the District Court, and discussed in detail by the Ninth Circuit in its decision, demonstrate that there is no basis for Petitioner's complaints about the relief afforded Respondent. Indeed, if there is any complaint here, it is that both the District Court and Court of Appeals found facts supporting a conflict based on a breakdown in attorney-client communication and applied a prejudice based analysis that resulted in reversal of the convictions. Each court should have reversed based on its finding of the constructive denial of counsel. The prejudice inquiry was unnecessary.

5(a). Concerned to demonstrate that there was prejudice that flowed from the irreconcilable conflict, and from defense counsels' ineffectiveness, both the District Court and the Ninth Circuit carefully enumerated those facts that demonstrated the widespread prejudice to Respondent. As the Ninth Circuit pointed out, not only were trial counsel Jordan and Small unable to discuss the

case, or his social, medical, psychological, legal, and institutional history with their client, but also, in the short time allotted to them, counsel did not complete basic case preparation. After both were appointed, they were left with three or four months before the trial began. They had to investigate the guilt phase defense, and the mitigation and rebuttal of aggravation at the penalty phase, while conducting pre-trial motion litigation. They filed numerous motions, but did not complete the necessary preparation, including the acquisition of basic, and obvious, medical, psychiatric, legal and public (litigation-related) records relevant to Respondent and his background. No case-specific psychiatric or psychological examination was completed (though one was initiated) by trial counsel prior to the commencement of the penalty phase. As the District Court and Ninth Circuit noted, the lack of defense preparation, and reliance on a preliminary screening by a psychologist inexperienced in forensic issues, allowed the State to characterize the defense evidence as unqualified and incompetent. (Petitioner's Appendix B at p. 16a.)

(b) During *habeas corpus* proceedings, the District Court retained its own expert, an experienced forensic psychiatrist, who reported that the foundational information made available to mental health experts for both parties at the time of trial was inadequate. In his view, neither the defense psychologist who testified at trial, nor the prosecution's rebuttal witness, "had sufficient information to make a reliable or informed diagnosis." (Respondent's Appendix B, Ninth Circuit opinion at p. 20a.) Moreover, the District Court's expert agreed with Respondent's experts on *habeas corpus* that the one truncated pretrial psychiatric evaluation initiated by Respondent's trial counsel produced findings that not only described

Respondent's mistrust of counsel, but also suggested a paranoia that should have raised questions about Respondent's competence to stand trial, and also provided the basis for defenses to the guilt phase charges, and mental state mitigation. These findings were not followed up on.

REASON FOR DENYING THE WRIT

Introduction

Petitioner urges this Court to grant the writ because, first, the Ninth Circuit misunderstood this Court's rulings on conflicts of interest between a criminal defendant and his counsel, and second, because the Circuit Court created a test for determining a conflict focused on the accused's 'subjective' views and not the 'objective' facts. Petitioner's arguments reflect neither the factual findings of the District Court, nor the Ninth Circuit's application of precedent to a unique set of facts.

As did the District Court, the Ninth Circuit concluded that a series of events, not the least of which were Respondent's repeated statements to the trial judge that he did not trust his counsel, and Lead Counsel's concurrence during post-conviction litigation that this was the case, provided the factual basis for a finding of an irreconcilable conflict in this case. It was the District Court, and not the Circuit Court, that first found that no case in the Ninth Circuit which had previously provided relief because of a breakdown of communication between client and counsel "... has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself." [Footnote omitted.] (Petitioner's Exhibit C at p. 77a.) Petitioner cannot, and does not, dispute this

finding. Rather, he contends that the Ninth Circuit provided relief based on a misapplication of the law. He is incorrect and his arguments provide no basis for granting review here.

Petitioner also argues that the Ninth Circuit's decision has created a conflict among the Circuits on when defense counsel can rely on defense experts when formulating their strategy. Petitioner suggests that the Ninth Circuit performed some analytical sleight of hand and created a test of ineffectiveness of counsel that is directed instead " . . . at the competence of the expert. . . ." (Petition at p. 17.) Nothing in the Circuit Court's decision supports Petitioner's formulation of the question, or the argument made to support it. Both the Ninth Circuit and District Court found that trial counsel had not followed up on easily available and significant evidence. As the Ninth Circuit noted, trial counsel failed to acquire and thus review Respondent's family and social history, which included a history of mental illness and substance abuse. Counsel had also not obtained the readily available medical, legal, and public records pertinent to Respondent's erroneous pre-capital case incarceration and remedial medical treatment. Nor had they obtained copies of Respondent's 1980 medical records, which, during *habeas corpus* litigation, were characterized as providing evidence that Respondent likely had developed brain damage in 1980, and some significant changes in his psychological outlook, including his increased paranoia. (Petitioner's Appendix B at pp. 17a-20a; also p. 36a.) Moreover, Respondent's prison record, if reviewed in detail, demonstrated that he had been the subject of psychiatric and psychological evaluations in prison prior to the capital

case that indicated mental problems. (Petitioner's Appendix B at p. 36a.)

Respondent's lawyers did not obtain information concerning their client's medication records, which would have demonstrated that he was taking a number of psychoactive medications (by prescription) at the time of the offense, and at the time of trial. The Ninth Circuit characterized the lack of collection and review of materials such as prior incarceration files and medical records as similar to the failure of preparation in *Rompilla v. Beard*, 545 U.S. 374, 382-384 (2005). As the Ninth Circuit pointed out (borrowing language from this Court), it is difficult to understand, especially given that Respondent was then only recently confined to a wheelchair because of a traumatic injury and was known to have a history of incarceration and medication, why these omissions occurred. Unlike counsel in *Rompilla*, admittedly, defense counsel in this case faced the daunting task of trying to prepare their case in a very short period of time.

The Ninth Circuit found evidence that the two mental health experts employed by the defense (one who tried to interview Respondent and wrote a one-page letter-report noting Respondent's concerns and paranoia, and the other who was called in the penalty phase trial) were not supplied with relevant and significant records pertinent to Respondent's medical, psychological, social, legal, and family history. (Petitioner's Appendix B at pp. 37a-39a, and n.28.) While the Ninth Circuit took counsel to task for having presented an inexperienced mental health expert as their only mental health witness at trial, the court emphasized that strategic decision-making, and informed approaches to the case, were not possible given the failure of basic investigation. (Petitioner's Appendix B at p. 39a.)

The Ninth Circuit summarizes six separate categories of omissions by defense counsel that it found significant, including: failure to follow up a preliminary screening examination suggesting that Respondent had a mental disorder; failure to follow up evidence of paranoia; failure to review social and family history; failure to investigate the impact of prescribed medication on Respondent at the time of the shootings; failure to investigate the impact of the combination of prescribed and illegal medications. (Petitioner's Appendix B at p. 19a.)

In addition, counsel failed to acquire, and supply to their expert, important medical records. These were characterized in post-conviction litigation as highly significant because they related to a time in Respondent's life (1980) in which he suffered a traumatic injury which, according to Respondent's principal post-conviction psychiatric expert (Dr. Richard Dudley), resulted in mental deterioration and the advent of a paranoid delusion that was important to an understanding of Respondent's later behavior. (Petitioner's Appendix B at pp. 16a-19a.) The omission at issue was more significant than the one in *Wiggins v. Smith*, 529 U.S. 510 (2003) in which counsel failed to follow up on information in their hands, and relied instead on a preliminary workup of the client as the basis for their decision-making and trial presentations. *Id.* at 522-525. Here, there was a clearly defined traumatic injury that resulted in obvious debilitation, Respondent's paraplegia. The question raised was thus not only what the pertinent records would disclose, but also what an expert would make of the significance of Respondent's medical and psychiatric history.

Petitioner attempts to couch this case as one in which a reviewing court had before it a record in which counsel

obtained thorough mental health evaluations, and well-founded expert opinions that any lawyer would have reasonably relied upon in making decisions. But as the Ninth Circuit pointed out, there was no indication that the expert retained, or the psychiatrist contacted, by trial counsel prior to trial conducted any testing and reviewed available records to buttress their views which were not presented in reports, but rather in brief letters. (Petitioner's Appendix B at p. 38a, n.28.) The one defense expert called in the penalty trial had done some screening testing, but not a full assessment. He had only seen some prior incarceration records. He had no available social, medical, legal, or family history; no medical records from 1980 to 1982; no medication records. The Ninth Circuit found that counsel had no reason to rely on unfounded opinions, and noted that counsel testified that he wanted to acquire more information but "was unable to pursue further mental health evidence because of funding and time limitations." (Petitioner's Appendix B at p. 39a.)

The conflict of interest that infected the attorney-client relationship was not cured by what preparation trial counsel were able to do. Rather, as found by the Ninth Circuit, the conflict of interest and the failure of preparation severely prejudiced Respondent.

A. The Ninth Circuit Correctly Applied the Law on the Implications of an Irreconcilable Conflict Amounting to a Deprivation of Counsel to this Case, and its Addition of a Prejudice-Intensive Analysis Was Clearly Intended to Demonstrate That its Ruling Was Factually and Legally Correct

The basis for relief in this case was a finding of denial of the right to counsel at the guilt and penalty phases based on an irreconcilable conflict of interest. The lower courts also found ineffective assistance in the failure to conduct basic record collection and client specific investigation. Petitioner makes intertwined arguments to urge the Court to grant *certiorari* on the basis that the Ninth Circuit has (in several ways) misinterpreted, or incorrectly applied, the required Sixth Amendment analysis to facts demonstrating an irreconcilable conflict. Petitioner argues that the Ninth Circuit has 'created' a test for determining an irreconcilable conflict " . . . based solely upon the subjective beliefs of the defendant." (Petition at p. 11.) This alarmist argument is neither supported by a plain reading of the Ninth Circuit's ruling (Petitioner's Appendix B), nor by the District Court's ruling as adopted by the Ninth Circuit (Petitioner's Appendix C), nor by the facts of the case. Indeed, Petitioner's statement of the case (Petition beginning at p. 2) omits so much of the relevant history that is a matter of record (and was recited in detail by the Ninth Circuit) that the arguments offered by Petitioner cannot survive scrutiny when applied to the known facts of the case.

The District Court stated succinctly what the facts demonstrated – a statement quoted and relied upon by the Ninth Circuit:

> No case in which the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel was violated by reason of a breakdown of communications has involved a more clear showing that the breakdown amounted to a constructive denial of the right to counsel itself . . . In this case, communications did not "break down," but rather never existed. Daniels'[s] refusal to communicate was the understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings.

(Petitioner's Appendix B at p. 28a, the Ninth Circuit quoting the District Court.)

The District Court set forth a 'factual history of representation' stating: "The court provides a detailed account of the history of Daniels' representation in order to ensure a complete record for appellate review." (Petitioner's Appendix C at p. 64a, n.9.) The history of Respondent's treatment by the trial court was punctuated by significant developments that essentially doomed trial counsel to their fate of having to prepare the defense of a capital murder case involving the highly publicized killing of two popular Riverside police officers in about four months, with a client who felt that he could not trust them. Here, the Ninth Circuit again quoted the District Court:

> The lack of communication between Daniels and his counsel was so profound that it rendered counsel completely unable to discover the basic information to give consideration to how best to defend Daniels at the guilt phase . . . or to develop any meaningful mitigation at the penalty phase.

(Petitioner's Appendix B at p. 28a, quoting the District Court.)

The trial court was told from the first appearance, which was Respondent's hospital room arraignment, that appointing the Public Defender was likely an error. The court did so nonetheless, though it was informed that Respondent had pending a petition for writ alleging the Public Defender's disloyalty to him and ineffectiveness in a prior case (the bank robbery case that resulted in Respondent's 1980 paraplegia) that would figure as part of both the guilt and penalty trial evidence in the capital case. The disloyalty was found in his representation by a Riverside Deputy Public Defender who was negotiating to join the Riverside District Attorney's office while representing Respondent without having notified his client. The ineffectiveness was a failure to investigate available defenses; encouraging Respondent to plead guilty to all charges in return for the promise that Respondent could continue his treatment and physical rehabilitation; and the failure to enforce the plea bargain when the 'deal' was not honored. Attorney Andrew Roth encountered Respondent lying soiled on a gurney in a courthouse hallway, despondent and suicidal, awaiting premature remand to State prison. Roth told Respondent that he would help. He ensured the plea bargain was enforced, and then prepared a *habeas corpus* petition for Respondent.

During the capital case, the trial court countenanced an arrangement that allowed the Public Defender to stay on as counsel of record, even though a 'private' lawyer outside that office, who had previously represented Respondent and had filed the pending *habeas corpus* action, was communicating with Respondent and planning the defense (Andrew Roth). Roth was eventually appointed by the trial court, but he was removed on motion by the prosecutor shortly thereafter. Then the Deputy Public

Defender handling Respondent's case, who had tried to ensure that Roth stayed on as counsel also had to withdraw – having told the trial court more than once that his office should not have figured in the case due to a conflict of interest.

The Public Defender Office stayed on as counsel for several months, without the case being prepared in any useful way. During post-conviction litigation it was revealed that the head of the Public Defender's Office had instituted a policy prohibiting declarations of conflicts of interest by his deputies because of political pressures aimed at curtailing expenses for appointed conflicts counsel. It was nine months into proceedings when the Public Defender, at the urging of several of his deputies, finally declared a conflict. In the interim, Respondent tried to salvage the appointment of attorney Roth by offering to waive his right to attack any defects in the proceedings if Roth were reappointed. The trial court demurred on grounds that it would not allow an indigent to dictate its procedures, and that Roth was to be called as a prosecution witness. Roth testified briefly to matters easily demonstrated by public records.

Regardless of the propriety of the trial court's rulings in removing attorney Roth, its repeated failures to address the Public Defender's conflict, especially after having been informed that Roth had been playing a key role in developing the defense, paved part of the way for the breakdown in the attorney client relationship that followed.

Having finally accepted the Public Defender's declaration of conflict (Respondent was first arraigned in mid-May, 1982 and the conflict declaration was accepted in February, 1983), the trial court then appointed Respondent a lawyer,

Carl Jordan. Mr. Jordan had been a Riverside prosecutor for many years, worked in a civil firm for a couple of years, and was taking Respondent's case as he was opening his own private practice. He had never handled a capital case as a prosecutor or defense counsel. He had never defended a major felony case. Mr. Jordan then recruited Warren Small, who had been in practice for two or three years and never handled a homicide case, to be his co-counsel.

While Respondent sought to have his trusted counsel Roth reappointed, he spoke with his newly assigned lawyers, Mr. Jordan and Mr. Small, with the understanding that they had been assigned to take over. Based on those discussions, and on his interpretations of his new lawyers' actions, Respondent concluded that he could not trust them, and he complained in writing to his former lawyer Andrew Roth that his Lead Trial Counsel was conveying what he said to the prosecution.

The record before the trial court, District Court, and Ninth Circuit, was that Respondent believed that Carl Jordan had been appointed in order to assure his conviction and to hasten his death sentence. He told his girlfriend and the private investigator working on his defense of his concerns. He explained to attorney Andrew Roth verbally and in writing (in letters that were before the District Court and Ninth Circuit) his distrust of his appointed trial lawyers. He repeatedly expressed the view that his trial lawyers were communicating whatever he told them to the District Attorney. While the letters to Roth were not made part of the record until post-conviction litigation, the California trial court was made aware of the distrust and conflict. Respondent explained on the record within three months of the appointment of his trial counsel that he did not trust Lead Counsel, and

he sent the trial court a letter stating the same thing in greater detail prior to the commencement of the guilt phase case. In doing so, he explained his view that his lawyers were talking to the prosecution outside of his presence, and that they were providing confidential information to the prosecution as part of a conspiracy to kill him. (Petitioner's Appendix B at p. 10a.)

By the end of the guilt phase, trial counsel joined in a pre-penalty phase motion by Respondent that attorney Roth be reappointed to assist in the penalty phase, noting the difficulties in attorney-client communication and Respondent's distrust of his attorneys. This motion was reiterated prior to a hearing on a motion for new trial when Respondent explained that he had not been able to confide in his lawyers.

The Ninth Circuit never concluded that Respondent had the right to choose his counsel. It did conclude, first, that the facts demonstrated the existence of a complete breakdown in the attorney-client relationship, and second, that the trial court had been informed of the problem, but failed to perform its duty to inquire into it. (Petitioner's Appendix B at pp. 28a-29a.) It also quoted the District Court's conclusion that under the circumstances, Respondent's failure to communicate with trial counsel was an "understandable reaction of a defendant faced with the death penalty whose right to counsel had been mishandled by the trial judge from the beginning of the proceedings." (Petitioner's Appendix B at p. 28a.) By the time of the appointment of his trial counsel, Respondent had been represented by four different Deputy Public Defenders, only one of whom was assigned to represent him for any length of time (and about whom Respondent made only the generic complaint that their Office had a conflict with

him), and by Andrew Roth, who had been operating as his Lead Counsel on a *pro bono* basis, and later by appointment, and who was removed by the trial court. Respondent's interest in the development of an attorney-client relationship that would lead to an effective preparation of his case was apparently of no concern to the trial court.

Nothing in the Ninth Circuit's analysis and ruling shows any departure from, or disagreement with, this Court's rulings on the limits of an indigent's right to choose counsel or to claim denial of a "meaningful relationship with counsel." *Morris v. Slappy, supra,* 461 U.S. 1, 3-4. (Petition at pp. 7-11.) Petitioner seeks to wrap the concerns here around the notion that the accused cannot frame a claim of inadequate representation based on a refusal to cooperate with counsel. Here, the record is clear that (a) over objection, the trial court initially appointed the Public Defender who had a conflict of interest with Respondent, (b) there was a lawyer (Andrew Roth) who had served as counsel of record with whom Respondent had a relationship of trust who was removed by court Order, (c) Respondent felt he had a factual basis for distrusting his appointed trial counsel who had been a prosecutor in Riverside, (d) trial counsel understood that Respondent distrusted them, (e) the distrust and conflict was brought to the attention of the trial court at a point at which a remedy could have been provided (prior to trial). The Ninth Circuit specifically referenced its understanding that Respondent did not have the right to a 'meaningful' attorney-client relationship. It also acknowledged rulings from this Court, and from the Ninth Circuit, indicating that it is a structural error under the Sixth Amendment for the accused to go through trial without any useful communication with counsel. (Petitioner's

Appendix B at pp. 23a-24a, citing *U.S. v. Cronic, supra*, 466 U.S. 648, 659, n.25.) Moreover, as the Ninth Circuit (and District Court) concluded, the procedural history related to the counsel issues in the case makes it clear that: "Daniels was not simply being obstreperous when he refused to communicate with counsel." (Petitioner's Appendix B at p. 26a.)

In sum, the factual findings of the District Court propelled it to find a Sixth Amendment violation. The Ninth Circuit reviewed the factual findings, and largely agreed with them, though it found that the attorney-client conflict infected both the guilt and penalty phase results.

B. The Ninth Circuit and District Court Correctly Concluded That There Was Prejudicial Ineffective Assistance of Counsel

Both the Ninth Circuit and District Court concluded that there were significant portions of Respondent's medical, family, social, legal, and institutional history that his lawyers did not have in hand. Respondent Jackson Daniels was charged with capital offenses in 1982. Before that, and for several years, he was in prison where (on more than one occasion) he was the subject of psychiatric and psychological evaluation. He was diagnosed as having major mental illness. Prior to the May, 1982 capital charges, during the commission of an armed bank robbery in 1980, Respondent was shot 9 times by police officers. He almost died on the operating table, and his medical records indicated he had lost so much blood that the level of blood loss was described by one of the psychiatrists in post-conviction litigation as likely to have caused brain damage. (Petitioner's Appendix B at pp. 18a-19a.) After this episode, Respondent was rendered a paraplegic, wheelchair bound,

and in need of psychological and physical therapy. He required constant pain medication, and other medications including the periodic administration of anti-depressants. As he was recovering, and undergoing further treatments, he was erroneously arrested and mistreated in the Riverside County Jail, requiring remedial medical care and resulting in an action for damages against the jail.

While trial counsel obtained two letter reports from the Public Defender's files from a psychiatrist who saw Respondent after he was shot in 1980, they had not acquired and reviewed: social, medical, legal, and family history documents that documented a familial history of mental illness; the 1980 hospital records documenting Respondent's level of injury and hypovolemic shock due to blood loss; the 1981 erroneous arrest records and the attendant handwritten narrative and medical reports; all psychological evaluation and treatment records up to the time of the capital case; Respondent's medication records from the time of the capital offense, and through the time of trial. (Petitioner's Appendix B at pp. 36a-37a.)

Because counsel did not have the above information in hand, they could not make informed decisions on trial strategy. Further, they could not fully investigate the available guilt phase defenses or penalty mitigation, and could not obtain fully informed advice from experts. The Ninth Circuit found that the lack of basic investigation and case preparation was ineffective. (Petitioner's Appendix B at pp. 33a-40a.) It did so with reference to this Court's rulings in *Rompilla v. Beard, supra*, 545 U.S. 374, 382-384, and *Wiggins v. Smith, supra*, 539 U.S. at 522-525.

The Ninth Circuit also found that trial counsel neither apprised the trial court of the extent of their communication problem with Respondent, nor sought out his prior lawyer Roth, who had a good relationship with Respondent. (Petitioner's Appendix B at pp. 32a-33a.)

The Ninth Circuit concluded that the omissions had been prejudicial because they deprived counsel of the ability to evaluate, and present, defenses at the guilt phase, and mitigation in the penalty trial. (Petitioner's Appendix B at pp. 43a-47a.)

The evidence that trial counsel had not acquired would have helped them not only explain Respondent's condition after 1980, and at the time of the killings in 1982, but also his condition at the time of his trial. The evidence of his prior psychological diagnoses, combined with evidence of the 1980 injury and deterioration, the need for daily medications and pain management, his profound feelings of hopelessness immediately after the 1980 wounding, the evidence of his erroneous arrest, jail mistreatment, and subsequent need for medical assistance all helped to explain his mental state at the time of the capital offenses and at the time of trial. Respondent's growing paranoia about being targeted by police, and his concerns about being 'railroaded' by the Riverside court system, were part of the available information.

Lead Trial Counsel submitted declarations, and testified, in the *habeas corpus* proceedings that he understood that Respondent's most plausible and fact-based defense (and mitigation) centered on making his actions and state of mind understandable to a jury. But in the absence of communication with his client, and without having acquired evidence that made Respondent's situation in 1982

part of a coherent history, trial counsel proceeded with a defense that required no input from his client – namely the defense (in the guilt phase) that Respondent had no involvement in the offenses. Given the short time to get ready for trial, counsel concentrated their efforts on the guilt phase, and were still preparing the case in mitigation when the penalty trial began.

This led to a penalty trial which was, at best, a presentation of a defense work in progress. While the defense presented some of Respondent's relatives, employers, friends, and its psychologist, it did so in such a way as to prompt devastating cross-examination and rebuttal. Its expert was described as ignorant of the basics of psychological assessment. The prosecutor used the defense's psychological presentation as a platform to inject further evidence in aggravation and counter-expert testimony that there was no support for the claim of mental state mitigation.

Having catalogued defense counsel's omissions, the Ninth Circuit concluded that these reached the guilt phase by depriving counsel of the basis to present what, at that time, were partial defenses that allowed the presentation of mental state evidence bearing on whether the accused deliberated and premeditated, thus allowing conviction on second degree (non-capital) murder. Also, the Circuit Court noted that Respondent could have used California's imperfect self-defense as a means of avoiding first degree murder conviction. (Petitioner's Appendix B at pp. 43a-45a.) At the penalty phase, the omissions to collect important records and information about their client deprived counsel of the ability to demonstrate that they had a reliable basis for their case in mitigation which the court concluded meant that " . . . the jury considering Daniels'

sentence was never exposed to meaningful mitigation evidence that may have meant the difference between a life or death sentence." (Petitioner's Appendix B at p. 47a.)

The Ninth Circuit's finding in that regard was firmly rooted in the factual inquiry, and findings, made by the District Court – the only court which (given that the State courts never granted Petitioner a post-conviction hearing) considered all of the evidence bearing on constitutional violations alleged in post-conviction litigation. The facts warranted the result.

C. The Ninth Circuit's Discussion of the Additional Prejudice Caused by Errors in Decisions on Change of Venue and Redundant Special Circumstance Issues Were Part of the Consideration of Cumulative Error, and Clearly Not the Basis for the Ninth Circuit's Essential Ruling

Petitioner also suggests that this Court grant review to address prejudice that was presumed by the Circuit Court in its analysis of change of venue issues. (Petition beginning at p. 20.) Petitioner omits one matter of key importance to the question of whether the Ninth Circuit's discussion of pre-trial publicity in this case warrants further action by this Court. By its own terms, the Ninth Circuit limited its consideration of the deprivation of the right to jury trial guarantee (related to prejudicial publicity) to the penalty phase of Respondent's case. (Petitioner's Exhibit B, Circuit Opinion at pp. 47a-50a.) Thus, the Ninth Circuit considered the trial court's refusal to change venue because of the extensive pre-trial publicity in assessing cumulative error warranting penalty reversal. (Petitioner's Exhibit B at p. 54a.) Furthermore, the Ninth

Circuit reversed the case because of the irreconcilable conflict, pointing to the cumulative error as adding weight to the necessity for vacating the death sentence.

A similar argument applies to Petitioner's complaint about the Ninth Circuit's analysis of the impact of the trial court's allowing redundant special circumstance findings to distort the weighing process during the course of the penalty decision-making. Petitioner takes the Ninth Circuit to task for its assessment of the structural error caused by the multiplication of the special circumstances. However, as with the discussion of the fair jury and media-related issues, the Ninth Circuit was clear that these entered only into the penalty-related cumulative error analysis. (Petitioner's Appendix B at p. 54a.)

The actual ruling was that "because Daniels was denied his Sixth Amendment right to counsel at both the guilt and penalty phases of his trial . . . ," Respondent should be afforded both guilt and penalty phase relief. (Petitioner's Appendix B at p. 55a.)

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: April 17, 2007

Respectfully submitted,

JOHN T. PHILIPSBORN
JOHN G. COTSIRILOS
Counsel for Respondent
Jackson C. Daniels, Jr.